**KENTUCKY PERSONNEL BOARD**
**MINUTES OF JUNE 14, 2019**

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chair Crall on June 14, 2019, at approximately 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky.

Board Personnel Present:

Brian J. Crall, Chair
Mark O. Haines, Vice Chair
Beverly H. Griffith, Member
William J. Byrley, Member
Catherine J. Monteiro, Member
Richard M. Waite II, Member
Tanya Lawrence, Member
Mark A. Sipek, Executive Director and Secretary
Stafford Easterling, General Counsel
Cynthia Perkins, Administrative Section Supervisor
Gwen McDonald, Administrative Specialist

2. **READING OF THE MINUTES OF THE REGULAR MEETING HELD MAY 6, 2019.**

The minutes of the last Board meeting had been previously circulated among the members. Chair Crall asked for additions or corrections. Ms. Monteiro moved to approve the minutes as submitted. Mr. Waite seconded and the motion carried 6-0. The Board members signed the minutes.

(Chair Crall does not vote, unless noted.)

3. **EXECUTIVE DIRECTOR AND SECRETARY'S REPORT**

Mr. Sipek stated that recent legislation extended the deadline before administrative regulations, unaltered in over seven years, expire as a result of the statewide sunset provision. This objection gave the Board time to make sure regulations will be thoroughly reviewed during the next few months. Also, the Perry Puckett v. CHFS Court of Appeals' decision has been received and the Board prevailed. However, the appeal may not be over; Mr. Sipek will let the Board know if the matter is taken up by the Kentucky Supreme Court.

4. **REPORT OF THE PERSONNEL CABINET**

Secretary Thomas Stephens, the Hon. Rosemary Holbrook, General Counsel, and Tiffany Yeast, the new Executive Director of the Office of Diversity, Equality, and Training, were present for the Personnel Cabinet. Secretary Stephens stated Ms. Yeast was appointed to this position to replace Chris Johnson, who has left state government. Red tape reduction pins were worn to show support for the recent changes to regulations to make them more efficient and effective.

Ms. Holbrook, together with Larry Gillis, Executive Advisor of the Office of Public Relations, discussed the amendment to the regulation regarding mediation; the amendment contains minor updates to reflect current practices and makes minor changes to the qualifications for mediatiors. Mr. Gillis discussed workplace resolution and the savings achieved by the state mediation program. He also elaborated on the need for more certified mediators to be added to the program since many former mediators have retired or left state government for private positions.

Amendment to Regulation - 101 KAR 2:230:
Kentucky Employee Mediation and Workplace Resolution Programs

Mr. Haines moved to approve the regulation as amended by the Personnel Cabinet. Ms. Monteiro seconded and the motion carried 6-0.

5. **ORAL ARGUMENTS (None)**

6. **INVESTIGATION**
**LITTLE SANDY CORRECTIONAL COMPLEX (LSCC)**

Mr. Sipek briefly reviewed the LSCC report and recommendation. He stated that a response had been received from the Justice and Public Safety Cabinet. No response was received from Mr. Harper, or anyone else directly impacted.

Secretary Stephens thanked Board members Tanya Lawrence and Catherine Monteiro for their dedication and hard work as part of the investigation team. When he originally referred this matter to the Personnel Board for investigation, he felt it may have been viewed as too political for the Personnel Cabinet to investigate because the incident(s) took place during the prior administration.

Secretary Stephens stated that the Personnel Cabinet has taken the reportedly recommended action against Stephen Harper; Mr. Harper is now decertified from state service.

Mr. Waite moved to approve the Little Sandy Correctional Complex Report and Recommendation. Ms. Griffith seconded and the motion carried 6-0.

Chair Crall commended the investigation team for their hard work. Ms. Monteiro thanked Mr. Sipek for his writing of the report and recommendation.

## 7. CLOSED SESSION/RETURN TO OPEN SESSION

Mr. Waite moved that the Board go into Executive Session for the purposes of discussing complaints, and deliberations regarding individual adjudications. Ms. Lawrence seconded. Chair Crall stated that a motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. [Pursuant to KRS 61.810(1)(j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be deliberations regarding individual adjudications as listed on the Board's Agenda for today's meeting.] (9:54 a.m.)

Mr. Waite moved to return to open session. Mr. Byrley seconded and the motion passed by acclamation. (10:38 a.m.)

## 8. CASES TO BE DECIDED

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments, where applicable.

### A. Paula Wade v. Education and Workforce Development Cabinet (2018-032) Deferred from May

Mr. Byrley, having considered the record, including Appellant's exceptions, Appellee's exceptions and request for oral argument, Appellee's response, and oral arguments, moved to accept the final order dismissing the appeal as altered and as attached to the minutes. Mr. Waite seconded and the motion carried 5-0. Ms. Lawrence abstained.

### B. Rodney Milburn v. Tourism, Arts and Heritage Cabinet/Fish and Wildlife Resources (2018-042 and 2018-130) (2 appeals) Deferred from May

Ms. Monteiro, having considered the record, including Appellant's exceptions and request for oral argument, Appellee's response, and oral arguments, moved to accept the final order dismissing the appeal as altered and as attached to the minutes. Ms. Lawrence seconded and the motion carried 5-0. Mr. Waite abstained.

C. **Thomas Blackwell v. Tourism, Arts and Heritage Cabinet/Fish and Wildlife Resources (2018-041) Deferred from May**

Ms. Monteiro, having considered the record, including Appellant's exceptions and request for oral argument, Appellee's response, and oral arguments, moved to accept the final order dismissing the appeal as altered and as attached to the minutes. Ms. Griffith seconded and the motion carried 5-0. Mr. Waite abstained.

D. **Danielle Hawkins v. Tourism, Arts and Heritage Cabinet/Fish & Wildlife Resources (2016-049) Deferred from May**

Mr. Byrley, having considered the record, including Appellee's exceptions and request for oral argument, and oral arguments, moved to accept the recommended order sustaining the appeal. Ms. Griffin seconded and the motion carried 4-1, with Mr. Haines opposing. Mr. Waite abstained.

E. **Sherri Baptiste v. Cabinet for Health and Family Services (2018-222)**

Ms. Griffith, having considered the record, moved to accept the recommended order dismissing the appeal. Ms. Lawrence seconded and the motion carried 6-0.

F. **Glenn Bell v. Transportation Cabinet (2018-057)**

Ms. Monteiro, having considered the record, moved to accept the recommended order dismissing the appeal. Mr. Waite seconded and the motion carried 6-0.

G. **Johnathen Nunez v. Department of Military Affairs (2018-263)**

Ms. Lawrence, having considered the record, moved to accept the recommended order dismissing the appeal. Mr. Waite seconded and the motion carried 6-0.

H. **Scot Ratzlaff v. Tourism, Arts and Heritage Cabinet/Parks (2018-158)**

Ms. Griffith, having considered the record, moved to accept the recommended order dismissing the appeal. Mr. Haines seconded and the motion carried 6-0.

I. **James Stanley v. Transportation Cabinet (2018-156)**

Ms. Griffith, having considered the record, moved to accept the recommended order dismissing the appeal. Mr. Waite seconded and the motion carried 6-0.

**Show Cause Orders – No Response Filed – Appeals Dismissed**

J. **Donna Cox v. Dept. of Veterans Affairs (2019-021 & 2019-022) (2 appeals)**
K. **Rita Richardson v. Cabinet for Health and Family Services (2019-030)**

Ms. Monteiro moved to accept the recommended orders and to dismiss the appeals for failure to prosecute the appeals. Mr. Waite seconded and the motion carried 6-0.

## 9. WITHDRAWALS

Mr. Waite moved to accept the following withdrawals *en bloc* and to dismiss the appeals. Ms. Griffith seconded and the motion carried 6-0.

A. Brian Cottongim v. Finance and Administration Cabinet (2019-056)
B. Evelyn Giesin v. Personnel Cabinet (2019-045)
C. Karen Goff v. Tourism, Arts and Heritage Cabinet/Parks (2019-009)
D. Evelyn Hays v. Cabinet for Health and Family Services (2019-050)
E. Marian Johnson v. Labor Cabinet (2018-170)
F. Robin Palmer v. Cabinet for Health and Family Services (2018-090)
G. Moleta Lambert v. Cabinet for Health and Family Services (2019-064)
H. Brenda Mumphrey v. Tourism, Arts and Heritage Cabinet/Parks (2018-207)

## 10. SETTLEMENTS

Mr. Haines moved to issue settlement orders and to sustain the appeals *en bloc* to the extent set forth in the settlements as submitted by the parties. Mr. Waite seconded and the motion carried 6-0.

A. Raymond Asher v. Energy and Environment Cabinet (2018-179)
B. Aaron Baker v. Justice and Public Safety Cabinet/Public Advocacy (2018-197)
C. Terri Lane v. Cabinet for Health and Family Services (2018-202) (Mediation)
D. Brad Marine v. Justice and Public Safety Cabinet/Juvenile Justice (2018-073 and 2018-193) (2 appeals) (Mediation)
E. Bronson Richards v. Transportation Cabinet (2017-230)
F. Antonio Wharton v. Justice and Public Safety Cabinet/Corrections (2018-173)
G. Alecia Whitt v. Cabinet for Health and Family Services (2018-111) (Mediation)
H. Morgan Atherton v. Cabinet for Health and Family Services (2019-074)
I. Leanne Edelen v. Department of Education (2017-220)
J. Shatika Hutcherson v. Cabinet for Health and Family Services (2019-005) (Mediation)

K. Carisa Robertson v. Tourism, Arts & Heritage Cabinet/Kentucky State Fair Board (2018-077 & 2018-144)
L. Emily Sergent v. Cabinet for Health and Family Services (2018-239)
M. Robin Vessels v. Cabinet for Health and Family Services (2017-029)
N. Tracy Yancy v. Department of Veterans Affairs (2019-002)

11. **OTHER**

A. **Stephen Knipper v. Office of the Governor**

Mr. Sipek stated the Agency/Appellee has filed a motion to dismiss. In addition, the Agency has requested the Hearing Officer's Interim Order be set for the Board's review, pursuant to regulation. When the Hearing Officer ruled on the motion, it denied the motion to dismiss and was silent on the issue of Board review.

Hon. Carmine Iaccarino, counsel for the Agency/Appellee, was present to answer any questions the Board had about the notice/motion. Mr. Sipek stated he understood that in order for the Interim Order to be reviewed by the Board, the Hearing Officer must rule as such in the Order. Mr. Knipper was not present for the Board meeting, although the Agency claims he was advised prior to the meeting that this matter would be discussed. Mr. Iaccarino stated he felt the Board had the authority to review the Order and would be requesting the Interim Order be amended to be reviewed by the Board.

B. **Annual Increments for Executive Director and General Counsel**

Mr. Sipek recommended that the Board continue its practice and not approve annual increments for himself or Mr. Easterling, since state employees did not receive an annual increment.

Mr. Waite moved to accept Mr. Sipek's recommendation that no annual increment be awarded, consistent with the budget for classified and unclassified employees. Ms. Monteiro seconded and the motion carried 6-0.

C. **Cindy Perkins, Administrative Section Supervisor, raise to midpoint**

Mr. Sipek requested the Board approve raising Cindy Perkins' salary to midpoint, pursuant to the revision of KRS 18A.110 and KRS 18A.155. He stated the Board had the funds available to do this. Mr. Sipek stated that if the Board approved this raise, it would then be submitted with justification for the raise to the Personnel Cabinet and the Office of the State Budget Director for their review and approval. Chair Crall asked for clarification for the Board, and Mr. Sipek reviewed the regulation change and the justification for Ms. Perkins' increase.

Secretary Stephens stated the regulation allows for this increase by way of a resign/reinstate action for any amount up to midpoint. He stated that midpoint is the highest salary amount an employee could be appointed to in State government. An ACE award and an ERA would be the only way to get an increase above midpoint. This is another tool used by the State to try to retain employees or widen the pool of applicants for positions.

Chair Crall stated there was statutory language that allowed for employees to receive a 5 percent increment, but noted that increment has not been approved since 2005. He stated he felt it was important for the Board to review this matter thoroughly as a part of their fiduciary duties.

Mr. Byrley moved to authorize Mr. Sipek to increase Cindy Perkins' salary up to midpoint. Ms. Monteiro seconded and the motion carried 6-0.

There being no further business, Mr. Waite moved to adjourn. Ms. Griffith seconded, and the motion passed by acclamation. (11:02 a.m.)

Brian J. Crall, Chair

Mark O. Haines, Vice Chair

Beverly Griffith, Member

William J. Byrley, Member

Catherine J. Monteiro, Member

Richard M. Waite II, Member

Tanya Lawrence, Member

**COMMONWEALTH OF KENTUCKY**
**PERSONNEL BOARD**
**APPEAL NO. 2018-032**

**PAULA WADE** **APPELLANT**

**VS.** **FINAL ORDER ALTERING THE HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER**

**EDUCATION AND WORKFORCE DEVELOPMENT CABINET** **APPELLEE**

* * * * * * * *

The Board, at its regular June 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated March 12, 2019, Appellant's Exceptions, Appellee's Exceptions and Request for Oral Argument, Appellee's Response to Appellant's Exceptions, oral arguments, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Findings of Fact paragraphs 4 and 5 and substitute the following:

4. The Appellant alleged that her behavioral problems were caused by Gulf War Syndrome and that mental illness plagued her work performance, but, with accommodations, was improving. The Appellant's claim that mental illness impacted her work performance is buttressed by the fact that the dysfunctional behavior predicted in the January 18, 2017 Employee Accommodation Report has played-out in Wade's work performance as evidenced by the behavior described as justification for the reprimands. The evidence of record establishes that the Cabinet imposed multiple verbal and written reprimands on Wade when it was unaware that

she suffered from Gulf War Syndrome and mental illness. The Appellant argues that the Cabinet's decision to suspend Wade was influenced by her prior reprimands without taking into account her disabilities. However, the Appellant failed to establish that the prior reprimands were issued **as the result of** her disabilities. Further, the Appellant failed to establish the reprimands issued by the Agency were issued without due consideration of the cause of the workplace misbehavior and of the severity of the disciplinary action imposed.

B. **Delete** Conclusions of Law paragraphs 2, 3, 4, and 5 and substitute the following:

2. The Cabinet's Anti-Harassment Policy Statement is "a statement concerning...the internal management" of the Workforce Cabinet. [See KRS 13A.010(1) and (2)(a).] The Policy Statement cannot be used to impose discipline on Wade. Only 101 KAR 1:345, Section 1, can be used to impose such discipline. *Kerr v. Kentucky State Board of Registration for Professional Engineers and Land Surveyors*, 797 S.W.2d 714 (1990). Such an understanding comports with the Board's recent finding in *Charles Phillips v. Tourism, Arts & Heritage Cabinet, Department of Fish and Wildlife Resources*, Appeal No. 2018-161, 2019 WL 2223966 (KY PB). *Phillips* provides that that Board "shall consider the internal policy and its definition of misconduct. The Board may then elect to apply the applicable internal policy to assist the Board in determining what constitutes misconduct in a particular work environment. Internal policy is persuasive authority and is not binding on the Board." Internal policies merely serve to aid the Board in performing their duty to ensure the provisions of KRS Chapter 18A and the 101 KAR series are being followed. Here, the Board finds that the Cabinet's Anti-Harassment policy is useful in making its determination as to what constitutes misconduct at the Workforce Cabinet. Accordingly, the Board adopts

the Cabinet's Anti-Harassment policy and concludes that violation of the Cabinet's policy constitutes misconduct for the purposes of 101 KAR 1:345.

3. Wade's disregard of the Cabinet's Anti-Harassment Policy that bans sexually indecent jokes gave substance to the charge that Wade violated 101 KAR 1:345, Section 1. The Cabinet has the responsibility to investigate even minor complaints of sexual harassment by coworkers to prevent a "workplace permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe and pervasive to alter the conditions of employment and create an abusive working environment..." *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, *Brewer v. Hillard*, 15 S.W.3d 1 (1999). An employer who allows the work environment to become hostile as defined in *Oncale* violates Title VII of the Civil Rights Act of 1964 and KRS 344.

4. Wade's sexual joke that it "looked like someone's going to get 'lei'd' tonight" did not rise to the level of actionable conduct that would "cause tangible psychological injury" and implicate either Title VII of the Civil Rights Act of 1964 or KRS Chapter 344. However, behavior that does not implicate either Title VII of the Civil Rights Act of 1964 or KRS Chapter 344 can still constitute 101 KAR 1:345 misconduct. Such is the case here. The Board concludes the Appellant's actions constitute 101 KAR 1:345 misconduct and, to the extent pertinent, specifically rejects the Hearing Officer's reliance on legal standards applicable to allegations of sexual harassment instead of a general misconduct standard. The Board finds that Wade's behavior does not implicate either Title VII of the Civil Rights Act of 1964 or KRS Chapter 344, but constitutes 101 KAR 1:345 misconduct.

5. Because Wade's behavior constitutes 101 KAR 1:345 misconduct, the Board finds the Cabinet established that the one-day suspension of the Appellant was taken with just cause and is neither excessive nor erroneous in light of all the surrounding circumstances. The Board finds the Appellant committed the misconduct alleged in the Cabinet's February 22, 2018 suspension letter and that a one-day suspension is appropriate in light of all the surrounding circumstances, including the Appellant's record of performance, her mental illness, and her request(s) for accommodation.

C. **Delete** the Recommended Order and substitute the following:

**IT IS HEREBY ORDERED** that the appeal of **PAULA WADE V. EDUCATION AND WORKFORCE DEVELOPMENT CABINET, (APPEAL NO. 2018-032)** is **DISMISSED.**

**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as Altered be, and they are approved, adopted, and incorporated herein by reference as a part of this Order, and the Appellant's appeal is **DISMISSED.**

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

**SO ORDERED** this 19th day of June, 2019.

**KENTUCKY PERSONNEL BOARD**

**MARK A. SIPEK**
**SECRETARY**

A copy hereof this day mailed to:

Hon. Maria "Tess" Russell
Hon. Joshua R. Hurley
Hon. Steven Bolton

**COMMONWEALTH OF KENTUCKY**
**PERSONNEL BOARD**
**APPEAL NO. 2018-032**

**PAULA WADE** **APPELLANT**

**V.** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER**

**EDUCATION AND WORKFORCE DEVELOPMENT CABINET** **APPELLEE**

** ** ** ** **

This matter came on for an evidentiary hearing on December 10 and 11, 2018, at 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. Stephen McMurtry, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Paula Wade, was present at the evidentiary hearing and represented by the Hon. Steven Bolton. The Appellee, Education and Workforce Development Cabinet, was present and represented by the Hon. Maria "Tess" Russell and the Hon. Joshua R. Hurley.

## BACKGROUND

1. On February 22, 2018, Elizabeth Steinle, Appointing Authority designee for the Education and Workforce Development Cabinet, suspended Paula Wade, a Workforce Development Facilitator, one workday for lack of good behavior, a violation of 101 KAR 1:345, Section 1. The alleged behavior consisted of telling fellow worker, Kelly Vance, "Hey, don't you look pretty, looks like someone's getting 'laid' tonight." And telling her, "I have a very reliable source that knows someone that works in Brian's branch that told me that you and Brian [Administrative Branch Manager Brian Gustafson] were in the side parking lot making out. You were leaned back in the car and going at it." Steinle alleged in her suspension letter that Wade's comments were inappropriate, disruptive to the workplace, and in violation of the Cabinet's Anti-Harassment Policy. In particular, the comments contained "abusive verbal language directed toward an individual because of sex," including "vulgar or indecent...jokes." Wade used the noun "lei," a Hawaiian necklace of flowers, as a verb that sounds like the slang word "laid," laden with sexual implications.

2. To enhance the seriousness of the violation, Steinle cited "previous actions issued against [Wade]," including a verbal reprimand of October 13, 2015, and written reprimands of November 13, 2015; October 31, 2017 (sic); and April 27, 2017, all for lack of good behavior. [**Hearing Officer Note**: A written reprimand dated October 31, 2017 was introduced into the record. After discussion, it became abundantly clear that the October 21, 2017 written reprimand was actually issued by the Agency on October 31, 2016. Accordingly, in analyzing this appeal,

the Hearing Officer, at his discretion, may determine that references to a October 31, 2017 written reprimand are actually referring to a October 31, 2016 written reprimand, depending on context.]

3. Wade's job duties are to investigate disputed unemployment insurance claims, determine employee eligibility, and apply federal laws and regulations to unemployment decisions. Wade suffers from Gulf War Syndrome, causing fatigue, headaches, and memory problems, and from bi-polar and obsessive-compulsive disorders. The Veterans Administration considers her 80 percent disabled. These conditions cause Wade difficulty in arriving at work on time, maintaining focus, expressing herself, following instructions, anxiety, and putting "a situation in context to confront [it] at appropriate levels." Although Wade has worked for the Cabinet for 16 years, she began having problems with her job in January 2015. In her May and September 2016 interim performance reviews, Wade failed to meet minimum standards of job performance.

4. On December 20, 2016, Wade met with Carol Weber, Rehabilitation Technology Branch Manager, Office of Vocational Rehabilitation to determine if there were accommodations that could be instituted to improve her work performance. Weber reported that Wade had little hope of continuing her employment, but had made some self-imposed changes in how she performed her work duties to "address the functional limitations...experienced at work." They included regular doctor visits "to address mental health issues" and development of "checklists" to assure that she addresses "each piece of information needed when writing a final determination of an unemployment claim." Weber suggested other accommodations: over-the-ear noise canceling headphones, a privacy screen in her office cubicle, frequent breaks, more flexible worktime, and written, rather than verbal, policy and work changes.

5. Paula Wade, Kelly Vance, and Jamie Keith, who overheard what was said, testified regarding the offending conversation. Appellant Paula Wade testified that Vance waved her into her work cubicle where she observed Vance wearing a Hawaiian lei. Wade asked Vance if she was getting "lei'd," a pun on the slang word "laid." Wade said she was "just making fun of things" as they often had humorous conversations. Wade said Vance was not offended and that Vance switched the conversation to ask if Wade had heard the rumor that she (Vance) and Brian Gustafson were "making out" in the employees' parking lot. Wade said she had, but when requested by Vance to tell her who was the source of the rumor, Wade refused. Vance continued to try to learn the source of the rumor in a series of emails sent to Wade.

6. Kelly Vance testified that Wade approached her, stating, "Hey, don't you look pretty, looks like someone's going to get 'laid' tonight." Then, Wade told Vance about a rumor that she had heard from a reliable source that she, Vance, was seen in a car in a side parking lot making out with Brian Gustafson. Vance asked Wade who the source was, but she refused to say. Vance testified that she was so upset, she took the rest of the day off.

7. Jamie Keith, Workforce Operations Manager, testified that she heard part of the conversation between Wade and Vance and had the duty to report what she had heard. She said she did not monitor the conversation, but she heard Wade say, "You're all dressed up, are you

getting 'laid' tonight?" Keith said that she also had a lei in her cubicle, which was next to Vance's.

8. Appellant Paula Wade testified that her behavioral problems caused by Gulf War Syndrome and mental illness plagued her work performance, but, with accommodations, was improving.

## FINDINGS OF FACT

1. Steinle's letter of suspension notified Wade that she was being disciplined for violating 101 KAR 1:345, Section 1, and for violation of the Cabinet's Anti-Harassment Policy that prohibits "inappropriate comments disruptive" to the workplace. Steinle's letter identifies Wade's February 9, 2018 conversation with Vance as the source of the offending comments.

2. On February 9, 2018, Wade went to Vance's work cubicle and said, "Hey, don't you look pretty, looks like someone's getting 'lei'd' tonight" and then told Vance that she had heard a rumor from a reliable source that she (Vance) and Brian Gustafson were in the side parking lot making out, leaning back, going at it. Wade's latter statement upset Vance, who then and in several subsequent emails, tried to get Wade to tell her the source of the rumor. Wade refused to tell her. Vance was so upset by the rumor that she left work early.

3. The Cabinet used a previous verbal and three written reprimands to enhance Wade's discipline from another written reprimand to a one-day suspension. The Cabinet considered a October 13, 2015 verbal reprimand imposed for failing to follow instructions "concerning countable and non-countable decisions." It used a November 13, 2015 written reprimand to enhance Wade's discipline for failing to follow instructions "to reassign all non-separation 6 issues to Tammy Brukwicki concerning PACCAR INC." The Cabinet considered a second written reprimand to enhance discipline imposed April 27, 2017, that concerned derogatory comments by Wade about her superiors, Pursiful and Houghlin, and her failure to follow directions. It also considered, to enhance Wade's punishment, a third written reprimand of October 31, 2017 (2016), that arose from a dispute concerning Wade's incomplete work assigned to another person. This last reprimand caused Wade to become extremely agitated, storm into a fellow worker's office, stating, "She lied to me" and charging into another office while calling a fellow worker a "liar." The reprimand described Wade as "shaking," "bright red" and exhibiting "balled fists."

4. The dysfunctional behavior predicted in the January 18, 2017 Employee Accommodation Report has played-out in Wade's work performance as evidenced by the behavior described as justification for the reprimands. The Cabinet imposed a verbal and a written reprimand on Wade when it was unaware that she suffered from Gulf War Syndrome and mental illness. The Cabinet further imposed two additional reprimands against her when they were, or should have been, aware that such behavior could have been caused by Gulf War Syndrome and her mental disabilities. The Cabinet's decision to suspend Wade for one day was influenced by her prior reprimands without taking into account her disabilities.

5. The dysfunctional behavior predicted in the January 18, 2017 Employee Accommodation Report has influenced Wade's work performance.

## CONCLUSIONS OF LAW

1. Another Hearing Officer has previously ruled in this appeal that the written reprimands may be introduced into evidence "to assist the Board in determining whether a particular disciplinary action was excessive or erroneous."

2. The Cabinet's Anti-Harassment Policy Statement is "a statement concerning...the internal management" of the Workforce Cabinet. [See KRS 13A.010(1) and (2)(a).] The Policy Statement cannot be used to impose discipline on Wade. Only 101 KAR 1:345, Section 1, can be used to impose such discipline. *Kerr v. Kentucky State Board of Registration for Professional Engineers and Land Surveyors*, 797 S.W.2d 714 (1990).

3. Wade's sexual joke that it "looked like someone's going to get 'lei'd' tonight" did not rise to the level of actionable conduct that would "cause tangible psychological injury" and implicate either Title VII of the Civil Rights Act of 1964 or KRS Chapter 344. "Mere utterance of an epithet which engenders offensive feeling in an employee does not sufficiently affect the conditions of employment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). The Cabinet acted excessively in comparing Wade's joke to the lewd, sexually-suggestive, and physically graphic behavior described in *Wolejszo v. Commonwealth*, 2009 WL 277436 (2009). A more apt description of the action came from Wade's attorney that the Cabinet was creating "a tempest in a teapot."

4. Wade's disregard of the Cabinet's Anti-Harassment Policy that bans sexually indecent jokes gave substance to the charge that Wade violated 101 KAR 1:345, Section 1. The Cabinet has the responsibility to investigate even minor complaints of sexual harassment by coworkers to prevent a "workplace permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe and pervasive to alter the conditions of employment and create an abusive working environment..." *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, *Brewer v. Hillard*, 15 S.W.3d 1 (1999). An employer who allows the work environment to become hostile as defined in *Oncale* violates Title VII of the Civil Rights Act of 1964 and KRS 344.

5. The Cabinet's imposition of a one-day suspension was "excessive and erroneous in view of all the surrounding circumstances" and violated KRS 18A.095 (22)(c). The Cabinet has a continuing duty to accommodate Wade's disability including consideration of the cause of workplace misbehavior and the severity of disciplinary action taken. *Kent v. Derwinski,* 790 F.Supp. 1032, 1040, (E.D. Wash. 1991); *Terre v. Hopson*, 780 Fed. Appx. 221, 227, 2017 WL 3775266 (6th Cir. 2017). It failed to do so.

## RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the disciplinary action against **PAULA WADE (APPEAL NO. 2018-032)** be **SUSTAINED to the extent** the one (1)

day suspension be rescinded and removed from the Appellant's personnel files and the Appellant receive a written reprimand in place thereof. The Appellee/Agency shall also reimburse the Appellant the amount of pay that was withheld from her because of the suspension – subject to all appropriate withholding, to reimburse Appellant for any leave time she used attending the hearing and any pre-hearing conferences at the Board, and to otherwise make Appellant whole. KRS 18A.105, KRS 18A.095(25), and 200 KAR 12:030.

## NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

**Any document filed with the Personnel Board shall be served on the opposing party.**

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

**[Hearing Officer Note: Any document filed with the Personnel Board shall also be served on the opposing party.]**

**ISSUED** at the direction of **Hearing Officer Stephen McMurtry** this 12th day of March, 2019.

**KENTUCKY PERSONNEL BOARD**

**MARK A. SIPEK**
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Maria "Tess" Russell
Hon. Joshua R. Hurley
Hon. Steven Bolton

**COMMONWEALTH OF KENTUCKY**
**PERSONNEL BOARD**
**APPEAL NOs. 2018-042 and 2018-130**

**RODNEY MILBURN** **APPELLANT**

**VS.** **FINAL ORDER SUSTAINING HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER AS ALTERED**

**TOURISM, ARTS AND HERITAGE CABINET, DEPARTMENT OF FISH AND WILDLIFE RESOURCES** **APPELLEE**

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The Board, at its regular June 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated January 9, 2019, Appellant's Exceptions and Request for Oral Argument, Appellee's Response to Appellant's Exceptions, oral arguments, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer be altered as follows:

A. **Add** Background paragraphs 72, 73, 74, 75, 76, 77, and 78.

72. The Hearing Officer sustained an objection to testimony to be offered by the Appellant that he was disciplined in retaliation for his activities associated with the Kentucky Conservation Officers Association. The Hearing Officer reasoned that the Appellant had specifically withdrawn his retaliation claim and, thus, the testimony would not be relevant. The Board agrees with Appellant's argument that the evidence should be considered in determining whether there was just cause for the disciplinary action. The testimony, which was offered by avowal, has been reviewed by the Board and considered as a part of this Order.

73. On avowal, Thomas Blackwell testified that he was the Secretary of the Kentucky Conservation Officers Association (KCOA) and Rodney Milburn was the President. In this capacity, they were both aware of allegations from Conservation Officer Josh Robinson that supervisors Coffey and Skaggs had interfered in Robinson's investigation of Fish and Wildlife Commissioner Jimmy Bevins. Bevins was accused of illegally placing bait (corn) on property that did not belong to him in order to prevent duck hunters from hunting in the area. Robinson alleged that Coffey and Skaggs interfered in his investigation and he brought this to the attention of the officers of the KCOA, including Milburn and Blackwell. The KCOA looked into the matter and had their attorney submit a document request from the Kentucky Department of Fish and Wildlife Resources and the United States Department of Fish and Wildlife under the Open Records Act and the Freedom of Information Act, respectively.

74. Blackwell testified that on November 16, 2017, Milburn, as President of the KCOA, sent a letter to all KCOA members finding that Coffey and Skaggs interfered in the Bevins' investigation. Coffey was a member of the KCOA.

75. Blackwell testified that, five days later, Milburn was placed on investigative leave. The letter drafted by Milburn to the KCOA members was introduced as an avowal exhibit.

76. Rodney Milburn also testified on avowal that he was the President of the KCOA from July 1, 2015, through 2017.

77. He testified that, based on his review of the investigation materials, he believed Coffey and Skaggs impeded the investigation. He stated that through the KCOA, these matters were referred to the Kentucky State Police and the Attorney

General's office, who felt they were serious, but did not believe there were felonies involved and did not pursue this matter any further.

78. Milburn testified about Coffey approaching him at a conference and wanting to sit down and talk about the investigation. Milburn stated this made him uncomfortable and he did not discuss it. Milburn also testified about his letter to the KCOA members on November 16, 2017, and the fact he was placed on leave on November 21, 2017. Milburn testified that if he had not sent the letter out, he would not have been disciplined. He further testified that both Coffey and Skaggs were investigated by the Executive Branch Ethics Commission.

B. **Delete** Findings of Fact paragraph 11, and substitute the following:

11. Testimony was introduced as to Captain Mehlbauer's involvement in the initial complaint resulting in the charges against Appellant. The Board finds Mehlbauer's testimony credible that, in October 2017, he asked the Appellant where the marijuana was from the deer case. Mehlbauer was shocked to learn it had not been disposed of and obtained a copy of the tape of the court suppression hearing thereafter. He stated he reported this matter to Colonel Coffey.

C. **Delete** Findings of Fact paragraph 17, and substitute the following:

17. Judy also addressed the case of *Wilbers v. Office of Attorney General*, Appeal No. 2017-007, 2018 WL 4037895, a case involving perjury as a factor in her decision. She added that the importance of an officer's credibility was addressed at length in that case and it was determined that the officer's credibility there had been irreparably damaged. Judy then explained that her conversation

with Assistant Commonwealth Attorney Logsdon had made clear that he no longer felt the Appellant was credible.

D. **Delete** Findings of Fact paragraph 21. and substitute the following:

21. The Board rejects the Hearing Officer's Finding that the Agency was concerned that the Appellant's action might subject them to potential 42 USC §1983 Civil Rights liability. The fact that the statute of limitations might have run and no civil action was filed against the Appellant or anyone else does not lessen the fact that the Appellant's conduct could have subjected the Department and its employees to civil liability. This was an appropriate consideration in assessing disciplinary action.

E. **Add** Findings of Fact paragraph 23. as follows:

23. The testimony offered by the Appellant and Thomas Blackwell does not establish that the Agency took disciplinary action against the Appellant in retaliation for his KCOA activity. The Board finds no causal connection between Appellant's KCOA activity and his disciplinary action.

F. **Delete** Conclusions of Law paragraphs 3 and 4. and substitute the following:

3. The Board rejects the Hearing Officer's "law of the case" analysis. As set out by the Kentucky Supreme Court in *Inman v. Inman*, 648 S.W.2d 847, 899 (Ky. 1982) (citations omitted):

> The law-of-the-case doctrine is a rule under which an appellate court, on a subsequent appeal, is bound by a prior decision on a former appeal in the same court and applies to the determination of questions of law and not questions of fact. "As the term 'law of the

> unless otherwise indicated, it designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case. Thus, if, on a retrial after remand, there was no change in the issues or evidence, on a new appeal the questions are limited to whether the trial court properly construed and applied the mandate. The term 'law of the case' is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court."

"Law of the case" does not apply to this matter as the Appellant's Personnel Board case and the criminal action involving Mr. Morton are not the same case. The parties to the Board appeal are Milburn and the Kentucky Department of Fish and Wildlife Resources, while the parties in the *Morton* criminal proceedings were Charles Morton and the Commonwealth of Kentucky. Accordingly, the "law of the case" doctrine does not apply.

4. The Board concludes from the evidence that the Appellant committed misconduct when he failed to give *Miranda* warnings and illegally seized evidence.

**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as altered, be and they hereby are approved, adopted and incorporated herein by reference as a part of this Order and that the Appellant's appeals are **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

**SO ORDERED** this 19th day of June, 2019.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Evan Jones
Hon. Ben Basil
Ms. Misty Judy

**COMMONWEALTH OF KENTUCKY**
**PERSONNEL BOARD**
**APPEAL NOs. 2018-042 and 2018-130**

**RODNEY MILBURN** **APPELLANT**

**V.** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER**

**TOURISM, ARTS & HERITAGE CABINET, DEPARTMENT OF FISH AND WILDLIFE RESOURCES** **APPELLEE**

** ** ** ** **

This matter came on for an evidentiary hearing on August 28 and August 30, 2018, at 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before the Hon. R. Hanson Williams, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Rodney Milburn, was present at the evidentiary hearing and was represented by the Hon. Ben Basil and the Hon. David Leightty. The Appellee, Tourism, Arts and Heritage Cabinet, Department of Fish and Wildlife Resources, was present and represented by the Hon. Amber Arnett. Appearing as Agency representative was Dawn Welch.

This matter involves a 15-day suspension, a demotion from Conservation Officer Sergeant to Conservation Officer I, and an involuntary transfer to Henry County, all by letter dated February 21, 2018. The burden of proof was placed upon the Appellee by a preponderance of the evidence.

The disciplinary actions herein resulted from an incident which occurred on or about November 7, 2015, in Breckenridge County, Kentucky. On that date, the Appellant, along with his partner Thomas Blackwell, in or around the residence of Charles Morton, arrested Morton for trafficking in marijuana and possession of drug paraphernalia. This resulted in Morton being indicted for these two offenses on or about February 4, 2016, in the Breckenridge Circuit Court.

The broad issue is whether the Appellant and his partner lawfully entered the residence, arrested Morton, and seized certain items which resulted in Morton's indictment.

More specifically, the Appellant is charged with conducting a search of Morton's bedroom without a search warrant in violation of KDFWR Policy 2.4; knowingly or recklessly making false statements under oath at the suppression hearing and in a January 3, 2016 letter to the prosecutor; failing to record the interaction with Morton on his body camera in violation of KDFWR Policy 2.26; violation of KDFWR Policy 2.4 (Searches and Inspections) in his

interactions with Morton; and unsatisfactory supervision of a subordinate officer and, generally, a lack of good behavior and unsatisfactory performance of duties pursuant to 101 KAR 1:345.

## BACKGROUND

### First Day of Hearing

1. The Appellee's first witness was the **Hon. Jeremy Logsdon**. He has served as the First Assistant Commonwealth Attorney for the 46th District for the previous six (6) years. This district covers Grayson, Breckenridge, and Meade Counties. The witness also previously served as a Public Defender. He testified he has previously worked with the Appellant on cases brought to him for prosecution.

2. The witness introduced Appellee's Exhibit 1, the Breckenridge Circuit Court records and further Orders concerning Charles Morton in the criminal matter. The witness testified that Milburn was the lead officer in that case. He also stated that the criminal matter had been set for a pretrial and suppression hearing, which occurred on December 7, 2016. The result of the hearing was that Circuit Court Judge Bruce Butler sustained Morton's Motion to Suppress based upon an illegal search and seizure.

3. The witness testified that he had reviewed body camera footage of the incident on the day in question, footage shot by the body camera of Thomas Blackwell. [Hearing Officer's Note: Milburn's camera was not operating.] After reviewing, the witness confirmed that he saw that Morton had made a confession, but he was concerned that there was no mention anywhere in the footage that Morton had been properly *Mirandized*. However, he stated that the Appellant's partner, Blackwell, told Logsdon prior to or at the suppression hearing that Milburn had told him he had *Mirandized* Morton during a time at which Blackwell was outside the residence running serial numbers for weapons which had been discovered.

4. The witness further stated that at the suppression hearing on December 7, 2016, Milburn testified that he had been a Jefferson County Police Officer for 28 years, and they had gone to Morton's residence on the day in question to serve a criminal summons for a deer allegedly being taken illegally. The witness said that Milburn told him he had given him the *Miranda* warning after also discovering two (2) pounds of marijuana in Morton's residence. He related that Milburn told him that at some point, Morton had been handcuffed. Milburn added he did not think he ever went back to the gun safe where the weapons were discovered. However, he added that Milburn had stated he had seen a handgun on the couch near the door.

5. The witness continued by stating that, following a review of the body camera footage and the testimony of those concerned, Circuit Judge Butler sustained the Motion to Suppress any evidence seized, based upon an illegal search and seizure for failure to given the required *Miranda* warnings. Subsequently, the witness contacted Captain Charles Phillips of the Agency by email and letter dated November 30, 2017, in which he related what had occurred at

the suppression hearing. The witness concluded his letter by stating to Captain Phillips that, after the hearing, the Appellant had attempted to talk to him about other upcoming cases, but the witness had refused to do so and told Milburn he had no credibility with him and he would never take another one of his cases to prosecute.

6. On cross-examination, the witness admitted that the suppression hearing had occurred approximately 13 months after the initial search and seizure from Morton's house. He also admitted that he had never talked directly to the Appellant prior to the suppression hearing. He did comfirm that he had sent a copy of the body cam footage to Appellant's counsel prior to the suppression hearing.

7. At some point prior to or at the suppression hearing, Blackwell told the witness that Milburn had *Mirandized* Morton at some point. The witness also stated that during Milburn's testimony at the suppression hearing, he did not seem to have a clear recollection of some of the facts. He admitted that he did not check prior to the hearing with Milburn, although his review of video footage seemed to contradict some of Milburn's story.

8. On redirect, the witness confirmed that he had reviewed a January 16, 2016 letter from the Appellant to Commonwealth Attorney David Williams [Appellee's Exhibit 1(A)]. This letter was received some two (2) months after the initial home search. The witness stated that Milburn had related in this letter that Morton had opened the gun safe and had pulled out the marijuana, which was subsequently found and for which he was indicted.

9. The Appellee's next witness was **Paul David Smith**. He has been a Staff Attorney with the Department of Criminal Justice Training since February 2017. This Agency provides training for law enforcement officers, including Fish and Wildlife Officers. The witness related that he had previously served 28 years with the Attorney General's office and six (6) years with the Alcohol and Beverage Control Commission. His service with the Attorney General's office was in the Appellate Branch, which dealt with *Miranda* rights, among other things.

10. The witness identified Appellee's Exhibit 4, a Training History Report for the Appellant given at the Criminal Justice Training Center. He related that, on December 6, 2010, and October 17, 2011, the Appellant had taken and completed classes which would have involved the giving of *Miranda* rights. These classes were taught by Shawn Herron and/or Mike Schwendeman and would have involved issues of taking into custody and the effect of handcuffing a suspect, both of which are related to the giving of *Miranda* warnings.

11. The witness stated that the basis of a constitutional search procedure is a preference for a search warrant. He stated, in general terms, that if there is no consent from the home owner, or possession of an arrest warrant by the officer, they should not go into the home. One exception might be exigent circumstances, which would involve four (4) classes: (a) imminent danger, (b) a pursuit, (c) a protective sweep, or (d) the danger of evidence being destroyed.

12. The witness then specifically commented on the October 2011 class taken by the Appellant, by stating that the Fourth Amendment "Search and Seizure" issue was taught in that class. He related that the lesson taught was that a failure to give *Miranda* warnings could result in the exclusion of evidence.

13. On cross-examination, the witness again stated that giving of a *Miranda* warning is generally required when there is custody and interrogation which takes place. He also added that a "protective sweep" generally happens indoors, as was claimed here by the Appellant.

14. The Appellee's next witness was **Captain Rick Mehlbauer**. At the time of the incident, he served as a Captain in the Agency. He has been employed with the Commonwealth for 28 years, with the last 11 years being with the Department of Fish and Wildlife Resources. He stated that he had undergone the Department of Criminal Justice Training program given to all enforcement officers and further, had 12 hours of Fish and Wildlife training plus yearly inservice training. This training included when and where to give *Miranda* warnings.

15. In his opinion, if a suspect is handcuffed at any point, he must be Mirandized. He also stated that in order to search one's residence, the officer needed either the homeowner's consent, a warrant, or there should be exigent circumstances.

16. The witness described the Department of Fish and Wildlife Resources as being made up of nine (9) law enforcement districts in the state. He is the District Commander for the counties in question. He generally has a Lieutenant and two (2) Sergeants who serve under him.

17. He went on to state that he had been the Field Training Officer (FTO) for Milburn when he came to the Agency. He was the Appellant's first-line supervisor and was Blackwell's second-line supervisor.

18. The witness testified that after having sent the Appellant and Blackwell to Morton's residence to check out a call of allegedly illegally taking a deer, he heard nothing about the circumstances for approximately one year. He stated that sometime in October 2017, he asked the Appellant where the marijuana was from the deer case. He stated he was shocked when the Appellant told him that it had not yet been disposed of. He added that he then obtained the tape of the Court's suppression hearing and first learned that the case had been dismissed.

19. He stated that he then reported this to Colonel Coffey, who gave him the tape sometime in October 2017. Following this, the witness next learned that the Appellant had been placed on special leave pending further investigation of allegations of misconduct by letter dated November 21, 2017.

20. On cross-examination, the witness related that he had, at some point, reviewed a copy of the citation from the original 2015 incident. Subsequently, he became aware that marijuana had been seized and knew the residence had been entered. He also stated that he knew of a December 2016 hearing, but did not know it was a suppression hearing. He confirmed that neither the Appellant nor Blackwell ever told him the case had been dismissed.

21. The witness also testified that he did not report these occurrences involving the court hearing to his supervisor, Major Estes, but instead went directly to Colonel Coffey. He added that he also told Officer Blackwell that he did not think the Commonwealth Attorney Logsdon had handled the case very well.

22. The Appellee's next witness was **Major Shane Carrier**. He has been with the Agency for 19 years, with 18 of those years being in the Law Enforcement Division. He is currently the Conservation Enforcement Assistant Director.

23. He testified he has served as Commander of both the eastern part of the state and the western part of the state. At the time of the occurrences herein, he was serving as District Commander of the Western District, which covers Breckenridge County.

24. The witness testified that part of his job involves reviewing citations and violations, which are handled by the Conservation Officers. He generally does this only after an Officer has requested to bring one in for review. In this case, he did not review anything prior to the suppression hearing. He added that he would only review potentially illegal searches made by an Officer if a complaint was made. He does not routinely review these.

25. He testified that between 2015 and 2017, the Appellant was a Conservation Officer Sergeant. He served as a first-line supervisor in the field (Lead Officer) and part of his duties were to ensure that policy was followed by his subordinates.

26. The witness related that he expected all his Officers to prepare for court by working with the Commonwealth Attorney's office. He added that he was a graduate of Eastern Kentucky University and had received the law enforcement training there, along with other peace officers and law enforcement officers. He stated that the training he received had involved *Miranda* rights, search and seizure, warrants, and exigent circumstances.

27. He added that the Agency procedure was that, upon receipt of a written complaint, to assign it for investigation and findings by someone. Any disciplinary actions were then to be recommended by a Colonel.

28. The witness introduced Appellee's Exhibit 6, KDFWR Policy 2.20. This governs administrative investigations of the Law Enforcement Division of the Agency. The witness testified that Captain Charles Phillips conducted the investigation into the matter involving Appellant. The witness then introduced Appellee's Exhibit 7, a copy of the investigative report by Captain Phillips dated 12/14/17. Carrier then testified that he had reviewed this case synopsis carefully and had made a recommendation for disciplinary action to Deputy Commissioner Charles Bush. The witness's recommendation was that the Appellant receive a written reprimand and remedial training for his actions on the day in question. He added that a factor in his recommendation was that of taking into consideration that the disciplinary process is supposed to be a progressive one.

29. Appellee's Exhibit 8 is a copy of Major Carrier's findings and recommendation to Deputy Commissioner Bush. He also stated that, as a part of his recommendation, the intent to commit perjury charge was unsubstantiated; therefore, he felt that the Appellant had no intent to make a false statement at the hearing, but relied upon a faulty memory. He also added that he did substantiate the failure to give *Miranda* rights in the Morton case. However, he added he felt it was appropriate for the initial entry of the residence, as it involved a safety sweep for the protection of the officers. He also thought there were no exigent circumstances, and believed a warrant had been needed to seize the marijuana.

30. The witness next introduced Appellee's Exhibit 9, the KDFWR Policy 2.2, Arrest and Citations. This exhibit reads, on page 6, Section 6(b) that "Before the suspect is interviewed in a custodial interrogation, the sworn member shall read aloud the *Miranda* warning."

31. The witness next introduced Appellee's Exhibit 10, KDFWR Policy 2.4, Searches and Inspections. The witness pointed out the policy of the division that "all searches and inspections are to be conducted within the provisions of the Fourth Amendment of the United States Constitution and the KY Constitution, Article 13, Section 11."

32. He also pointed out, under the heading of PROCEDURES, (A) Searches, "If any sworn member has a question as to whether or not a search is lawful, the sworn member shall contact a supervisor. Any doubt should be resolved in favor of the individual's reasonable expectation of privacy."

33. On cross-examination, the witness was directed to his February 9, 2018 recommendation to Deputy Commissioner Bush (Appellee's Exhibit 8). In that, he stated he felt the initial entry was justified under the "protective sweep" exception. He felt that Appellant's testimony at the hearing about not giving the *Miranda* warning was understandable because he had not reviewed the tape from 13 months previous. The witness also felt that the charge of perjury against the Appellant was unsubstantiated in that it had to be based upon intent.

34. He added that he had recommended a written reprimand to Deputy Commissioner Bush based partly on other officer's actions and the discipline they received. He also added that the Appellant had good evaluations, no prior discipline, and he felt the need to use the progressive discipline policy.

35. Addressing Captain Mehlbauer's claims of not knowing about the suppression hearing decision, the witness added that nothing would have stopped Mehlbauer from talking to the Appellant or Blackwell at any time during the intervening period prior to the hearing or after.

## Second Day of Hearing

36. The Appellee's first witness on this day was **Misty Dugger Judy**. She serves as the Executive Director for Human Resources and as Deputy Commissioner for the Department of Fish and Wildlife Resources. She has been designated as the appointing authority since 2017.

37. Her previous experience includes service as General Counsel for the Executive Branch Ethics Commission and working in the Criminal Appeals Branch for the Department of Public Advocacy.

38. She testified that her appointing authority designee, Billye Haslett, had authored the December 19, 2017 letter to the Appellant informing him of various complaints received from the office of Commonwealth Attorney David Williams. She advised that she had not talked with Colonel Coffey of the Agency when beginning her review of this matter, because he was involved in other matters, which eventually led to his resignation in January 2018.

39. She next introduced Appellee's Exhibit 13, a February 21, 2018 letter to the Appellant advising him of a 15-day suspension, a demotion from Conservation Officer Sergeant to Conservation Officer I, and an involuntary transfer to Henry County. The demotion resulted in a salary decrease from $41,116.00 annually to $37,004.40.

40. The witness further testified that, in making her decision, she had reviewed the Appellant's evaluations, his training, any prior disciplinary actions, the files relating to the *Morton* case, and the tape and records involving the suppression hearing. She then related that she had talked to the General Counsel at Kentucky State Police (KSP) and had reviewed the recommendation from Major Carrier, as well as interviewing Assistant Commonwealth Attorney Jeremy Logsdon.

41. After her review of the *Morton* case and the body camera footage, she indicated she had concerns about the illegal entry, the illegal siezure and the fact that there was no body camera operated by the Appellant. She was also concerned about the question of failure to give *Miranda* warnings, and the decisiveness and quickness of the Circuit Judge's decision at the suppression hearing.

42. The witness also explained her decision not to follow Major Carrier's recommendation of a written reprimand. She answered that the Department of Fish and Wildlife Resources had the least amount of any officer discipline of any Agency she had ever been involved with. She thought they had been lax in imposing discipline in the past. She was also concerned that Major Carrier did not seem to be familiar with Section 1983 actions (Civil Rights violations) by officers, and she thought that he probably misunderstood the concept of progressive discipline. In her mind, she was balancing corrective action versus serious misconduct by the Appellant.

43. Asked as to why a different penalty was imposed against Officer Blackwell, the witness stated that she considered that he was inexperienced, he had his body camera operating, there was no threat of violence from him, and he attempted to cooperate with the Commonwealth Attorney.

44. Regarding other potential violations by Fish and Wildlife personnel, the witness was referred to the case of *Stacey Bryant*. In this case, Bryant was given a three-day suspension for poor work performance and violating arrest, search, and transport procedures (Appellee's

Exhibit 14). The witness differentiated this matter from that of the Appellant by stating that the only violation in *Bryant* was failure to discover a revolver from the arrestee during transport. She felt there was no violation of any constitutional right in that matter.

45. The witness also added that in talking with counsel for KSP, and in reviewing the case of *Wilbers vs. Office of Attorney General* (PB 2017-007), a case involving perjury, she decided that it was very important when an officer's credibility had been damaged, as was the case there. She compared the *Wilbers'* case to the instant case wherein Assistant Commonwealth Attorney Logsdon had made the statement that he no longer felt the Appellant was credible and would not prosecute any of his cases.

46. The witness admitted that she did not interview the Appellant prior to making her decision. She added that she felt he should not have entered the residence and should have obtained a warrant for any arrest. She again expressed concern about the Agency's Section 1983 Civil Rights exposure because of the Appellant's actions.

47. Asked about the involuntary transfer, the witness answered that she felt the Appellant could no longer work with the Commonwealth Attorney in his district and she did not want to leave him in a supervisory capacity over his former colleagues in his district.

48. On cross-examination, the witness was directed to three (3) incidents or complaints involving the Appellant which had appeared in a November 30, 2017 letter from Commonwealth Attorney David Williams to Captain Phillips (Appellee's Exhibit 11). The witness made clear that none of the three (3) complaints filed in that letter were ever substantiated against the Appellant.

49. Referred back to the earlier *Stacey Bryant* disciplinary action for failure to find a deadly weapon during a search, counsel for the Appellant then asked rhetorically to compare that case to the potential danger faced by the Appellant here and his actions in entering the residence.

50. The witness was then directed to Appellant's Exhibit 6, an October 9, 2017 letter to Commissioner Johnson and Deputy Commissioner Bush from Captain William Grayson. This involved an investigation conducted against the Appellant and others at a "Poker Run Conference" at Lake Cumberland, supposedly involving on-duty consumption of alcohol and discussion of Kentucky Conservation Officer's Association (KCOA) business on state time. Grayson's report cleared the Appellant of any charges.

51. Lastly, the witness introduced Appellant's Exhibit 7, a Personnel Action Notification (PAN), from the Personnel Cabinet promoting the Appellant from Conservation Officer II to Conservation Officer Sergeant in December 2015. The Appellee announced closed in-chief.

52. Appellant's first witness was **Thomas Blackwell**. He has been with the Department of Fish and Wildlife Resources for approximately six years in the Law Enforcement

Section and now serves as a Conservation Officer II. His primary duties involve controlling wildlife and boating issues.

53. He testified that he has undergone 18 weeks of training at the Department of Criminal Justice Training in Richmond, Kentucky. In addition, he has undergone 12 weeks of Fish and Wildlife Training. He also stated that he is a member of the Kentucky Conservation Officers Association (KCOA). He related that the Appellant has been the president of that association for the past two (2) years.

54. The witness testified that he and Milburn went to the residence of Charles Morton on November 7, 2015, with the intent of serving a criminal warrant for the alleged illegal taking of a deer. Blackwell stated that the Appellant had been his Field Training Officer. Blackwell was the lead officer that day.

55. The witness went on to add that the purpose of the visit, along with the summons, was to seize the weapon that had shot the deer. He added that no warrant was needed to do that. He testified that, at approximately 6:00 p.m. it was almost dark and, as the officers approached the residence, there was no cover as they approached. Therefore, he said they had some safety concerns.

56. The witness testified that after knocking on the door, Morton barely opened the security door where they could only see one side of his body. Blackwell then related that Morton came out on the front stoop and, after some words were exchanged, he shoved Officer Milburn. Immediately, Milburn ordered Blackwell to handcuff Morton and stated he had smelled the odor of marijuana.

57. The witness related that Morton, accompanied by the officers, went into the house to get his license and, at that time, this witness saw the pistol within arms' reach on a couch and saw some marijuana. He then related that under those circumstances, they were not going to let Morton retrieve any gun.

58. The witness then testified that after Morton showed them where the gun safe keys were, the Appellant opened the gun safe and saw various weapons plus what turned out to be two (2) pounds of additional marijuana. At that point, the witness related that Morton was arrested. Blackwell testified that he went outside to run the serial numbers of the guns discovered, and was later told by the Appellant that he had given Morton his *Miranda* rights while they were in the kitchen by themselves. Blackwell stated he had no reason to doubt this, as he was aware of the Appellant's years of law enforcement experience. The witness then stated that the Appellant had reported the paperwork and the actions of this incident on to Captain Mehlbauer. The witness also related that neither of the officers met with Assistant Commonwealth Attorney Logsdon prior to the suppression hearing. However, he stated that when he had dropped off the body cam footage for Logsdon to review, Logsdon had questioned him as to whether *Miranda* rights had been given.

59. The witness also stated that after the events of the suppression hearing, Logsdon did not wish to speak with the Appellant, evidently thinking he was lacking in credibility. The witness then testified that he did meet with Captain Mehlbauer sometime in December 2017 to discuss the case.

60. On cross-examination, the witness testified that his body camera was on and showed the footage provided at the suppression hearing. Blackwell testified that he had done a quick check of Morton's criminal history before entering the property. He stated that Morton did give the gun safe key to the Appellant, which he then opened. He concluded by stating that he did not personally witness the *Miranda* warnings being given to Morton by the Appellant.

61. The Appellant's next witness was himself, **Rodney Milburn**. The Appellant testified that he has been with the Department of Fish and Wildlife Resources for approximately nine (9) years. He is currently a Conservation Officer I in Washington County. In 2015, he was a Conservation Officer II assigned to Meade County. He has undergone ten (10) weeks of Fish and Wildlife Training during various in-service training events.

62. He explained that he had begun with the Jefferson County Police in July 1974 and progressed through the ranks from Sergeant to Lieutenant to Captain. He added that after the merger of the two police forces in Jefferson County, he was a Major in the Louisville Metro Police Force for six (6) years, where he oversaw major events with the specialized units. He added that he has over 40 years' experience in law enforcement.

63. He testified that on November 7, 2015, he was called by his partner, Thomas Blackwell, to assist him in serving a criminal summons at the residence of Charles Morton. This occurred at approximately 6:00 p.m., Central Time. The witness stated that there was one bare light on the front stoop and, as it was somewhat shining in their eyes as they approached, they were aware of some safety concerns. This was especially true when hunters and/or possible guns might be involved.

64. He stated that Morton opened the wooden front door and barely cracked the storm door. At that point, his right hand was up on the wall inside the residence. The Appellant stated that he smelled marijuana and thought he heard other voices. At that point, he felt that Morton was probably armed.

65. The witness related that Morton stepped out on the front stoop and he thought he heard Morton drop something in the house. At that point, he asked to go into the house, at which time Morton put his hand up to stop him from entering, physically touching the Appellant. The Appellant then stated that he pushed him away and handcuffed him, although not stating that he was arrested at that point. His reason for handcuffing Morton was that he did not want to allow him a chance to retrieve a gun he may have dropped.

66. The witness then stated his reasons for wanting to enter the residence at that point. These were: safety, to secure the evidence of marijuana, and to collect any firearms present. He stated that upon first entering, he saw a Ruger pistol on the couch below the area where Morton

had been standing inside the door. He added that, upon further entry, he saw drug paraphernalia and some marijuana. At this point, Blackwell then cleared the hallway back into the bedroom area.

67. The witness stated that Morton then revealed that he had a .308 rifle and marijuana in his gun safe in the bedroom. The officers would not let him retrieve the gun and, after being given the keys, the Appellant opened the gun safe. He testified that upon opening the safe, he found 13 bags of marijuana, which he seized. He stated that he then placed Morton under arrest and gave him his *Miranda* rights. He stated that these rights were given while he and Morton were walking in the hallway and while Blackwell had gone outside to run the serial numbers of the weapons discovered. He added that he has given *Miranda* rights as a matter of course during his law enforcement career.

68. The Appellant then related that the arrest was made for charges of trafficking in excess of eight (8) ounces and for possession of drug paraphernalia. He added that the arrest report went up to the next-line supervisor and on to Captain Mehlbauer. He insisted that he talked with Captain Mehlbauer the following day (November 8) concerning these charges. He added that the marijuana was placed into evidence at the Otter Creek Facility in Meade County. This witness then disputed the previous testimony of Captain Mehlbauer that he did not know about the November 7 incident at the Morton residence.

69. The Appellant related that his first contact with the Commonwealth Attorney's office was after receiving a subpoena to appear at the suppression hearing. He stated that Assistant Commonwealth Attorney Logsdon never asked to meet with him before the hearing and did not try to prepare him to testify.

70. The Appellant stated that he had reviewed the case file, but not the body cam footage. He testified at the suppression hearing relying only on his memory.

71. The Appellant then stated that, to his knowledge, there had never been a court order entered to destroy the marijuana and he supposed it was still at the Otter Creek Facility. He concluded by stating that he knew of no other officers within the Agency who had violated policies and been disciplined.

## FINDINGS OF FACT

1. On November 7, 2015, Captain Rick Mehlbauer instructed the Appellant and subordinate Officer Thomas Blackwell to go to the home of Charles Morton in Irvington, Kentucky, to serve a criminal summons on him for illegally taking deer. The initial purpose of the visit was to seize the weapon which had shot the deer. No warrant was needed to do that. Both officers approached the residence at approximately 6:00 p.m., with darkness approaching, and the officers indicated in testimony they had some safety concerns because of the lack of cover and the fact that Morton, presumably, had weapons inside the residence.

2. After knocking on the door, resident Morton approached and barely opened the security door where only one side of his body was visible. Both officers indicated that Morton's right hand was up against the inside doorframe. The Appellant related that upon asking Morton to step outside, they heard a noise inside, indicating something had been dropped. After Morton stepped outside, he made contact with the Appellant and the Appellant responded by having Blackwell handcuff Morton. After then entering the house to retrieve Morton's license, Blackwell saw a pistol within arm's reach and some marijuana.

3. Both Blackwell and Milburn testified that the reason for handcuffing Morton was so as not to allow him a chance to retrieve any gun he may have dropped. Both officers testified their reasons for entering the residence after handcuffing Morton were safety, to secure the evidence of marijuana, and to collect any firearms present.

4. After having observed the Ruger pistol and marijuana immediately inside the residence, the officers questioned Morton as to whether other weapons or marijuana were in the residence. As a result, Morton, still in handcuffs, led them to a back room where a gun safe was. After opening the gun safe, the two officers observed various weapons plus an additional two pounds of marijuana. At that point, Blackwell stated that Morton was placed under arrest.

5. Blackwell testified that while he went outside to run serial numbers on the weapons discovered, the Appellant remained inside with Morton. Blackwell stated he was later told by the Appellant that he had given Morton his *Miranda* rights while they were in the kitchen by themselves. During this entire process of initial entry and further proceedings, Blackwell's body camera was recording footage, while the body camera of the Appellant was not operating.

6. The initial confrontation between the officers occurred with Morton on November 7, 2015. Subsequent to that, charges were brought against Morton in the Breckenridge Circuit Court. On December 7, 2016, some 13 months after the incident, a suppression hearing was held in the Breckenridge Circuit Court in an effort to suppress evidence seized based upon an illegal search and seizure, and for failure to give the required *Miranda* warnings. *Miranda v. Arizona*, 348 U.S. 436 (1966) holds that a handcuffed individual is considered in custody for purposes of the *Miranda* protections. These include giving the individual his rights to understand the charges against him and to consult with an attorney before answering questions. *Miranda* also holds that, as far as home entry and search is concerned, an officer must have a warrant, consent, or exigent circumstances must exist.

7. David Smith, an expert on appellate practice and longtime legal training officer, testified that exigent circumstances are limited to when a life is in imminent danger, evidence is in imminent danger of loss or destruction, property is in imminent danger of loss or destruction, or an officer is in hot pursuit. He also stated that a protective sweep for officer's safety may be done in certain situations.

8. As a result of the Breckinridge Circuit Court's ruling suppressing the evidence seized, the case was voluntarily dismissed by the Assistant Commonwealth Attorney, Jeremy Logsdon.

9. After Morton was handcuffed, even though he was told he was merely being detained, this actually was an arrest and custody for purposes of the *Miranda* warnings. The officers both stated they entered the residence and secured the weapons and marijuana under their theory of exigent circumstances. They argue this was to both preserve the evidence of marijuana and for their own protection in securing the weapons safely. Major Shane Carrier concluded in his report that there were exigent circumstances, which existed in the form of a protective sweep. This conclusion was a supporting basis for his recommendation of light punishment for the Appellant.

10. Both Major Carrier and Misty Judy, the Appointing Authority, concluded the Appellant had not knowingly made a false statement at the suppression hearing. This was apparently due, in part, to the 13-month interval between the incident and the suppression hearing, and was partially blamed upon the faulty memory of the Appellant at the suppression hearing.

11. Although much testimony was introduced as to Captain Mehlbauer's involvement in the initial complaint resulting in the charges against Appellant, the Hearing Officer finds that such testimony is not before the Board. By motion dated June 26, 2018, the Appellant amended his appeal to withdraw any claims of "political discrimination and retaliation." Said motion was granted by Order dated July 25, 2018. Any such testimony or evidence at the evidentiary hearing attempting to support claims of political discrimination or retaliation are, therefore, not considered by the Hearing Officer.

12. Major Shane Carrier, Commander of the Western District at the time herein, related that he had carefully reviewed a case synopsis and had made a recommendation for disciplinary action to Deputy Commissioner Charles Bush. The recommendation was that the Appellant receive a written reprimand and remedial training for his actions on the day in question. He also considered that the disciplinary process was supposed to be a progressive one. Interestingly, Carrier's report did substantiate his finding of the failure by the Appellant to give *Miranda* rights in the Morton case. However, he concluded it was appropriate for the initial entry of the residence, as it involved a safety sweep for the protection of the officers. Also, Carrier concluded there were no exigent circumstances outside the safety sweep and believed a warrant had been needed to seize the marijuana.

13. Officer Blackburn, the Appellant, and Major Carrier have received extensive law enforcement training at the Eastern Kentucky University Center for Criminal Justice Training, as well as other related law enforcement training. In addition, the Appellant has over 40 years of law enforcement experience and served almost 30 years with the Louisville Metro Police Department, rising to the position of Major at his retirement. It is confirmed by the Appellant and is self-evident that he has had extensive experience with *Miranda* rights, search warrants, and search and seizure issues.

14. Appointing Authority Misty Judy explained her reasons for imposing the disciplinary actions herein. She stated that she had reviewed the Appellant's evaluations, his

training, any prior disciplinary actions, the files relating to the *Morton* case, and the tape and records involving the suppression hearing. In addition, she had talked to the General Counsel at Kentucky State Police and had reviewed the recommendation from Major Carrier, as well as interviewing the Assistant Commonwealth Attorney, Jeremy Logsdon.

15. Judy indicated she had concerns about what she considered to be an illegal entry, illegal seizure of evidence, and the fact there was no body camera footage operated by the Appellant. In addition, she was concerned about the issue of failure to give *Miranda* warnings.

16. Judy further elaborated that felt that the Department of Fish and Wildlife Resources had the least amount of officer discipline of any agency she had ever been involved with and considered them to have been lax in the past in imposing discipline. She also expressed concern that there was potential civil rights liability in the form of 42 USC 1983 actions, which might befall the agency if Morton had filed a complaint or lawsuit alleging an illegal entry and illegal search and seizure.

17. Judy also addressed the case of *Wilburs v. Office of Attorney General* (PB 2017-007), a case involving perjury as a factor in her decision. She added that the importance of an officer's credibility was referenced in that case and it was determined that the officer's credibility there had been damaged. Judy then explained that her conversation with Assistant Commonwealth Attorney Logsdon had made clear that he no longer felt the Appellant was credible.

18. Further reasons given for the decision to impose an involuntary transfer and demotion were that Judy felt the Appellant could no longer work with the Commonwealth Attorney in his district and she did not want to leave him in his supervisory capacity over his former colleagues in his district.

19. The Hearing Officer rejects the Appellant's argument that Appointing Authority Judy was bound by the prior disciplinary precedence, or lack thereof, in the Department of Fish and Wildlife Resources. Whether prior administrators in the agency had strictly or loosely interpreted policies and imposed or not imposed discipline, Judy has the responsibility to investigate and decide the discipline based upon the current situation before her. "A public officer's failure to correctly administer the law does not prevent a more diligent and efficient officer's proper administration of the law." *Natural Resources and Environmental Protection Cabinet vs. Kentucky Harlan Coal Company, Inc.*, 870 S.W.2d 421, 427 (Ky. App. 1993).

20. The Hearing Officer finds that no policy was introduced pertaining to the allegations of Appellant failing to operate a body camera at the Morton residence, only extremely collateral testimony disclosed that the Appellant's camera had failed to operate. Therefore, the Hearing Officer finds this charge is not appropriately before him for decision.

21. Regarding the Agency's argument that Appellant's actions subjected them to a potential 42 USC 1983 Civil Rights action by Morton, the Appellant notes Morton never brought a claim against the Department or made a complaint to the Department regarding Milburn or any

of the events leading to or including his arrest. It is also important to note that the statute of limitations in Kentucky for a Section 1983 claim is one year after the incident alleged to have violated a right – in this case, one year after the November 7, 2015 arrest of Morton. KRS 413.140(1)(a). It is uncontroverted that Appointing Authority Judy's decision to impose discipline on the Appellant was made in February 2018, long after any potential Section 1983 action could have been filed.

22. **Applicable law, policies, and regulations**:

(1) KDFWR Policy 2.2 (Arrests and Citations)

**PROCEDURES**

A. Arrests

6. Custodial Arrest

b. Before the suspect is interviewed in a custodial interrogation, the sworn member shall read aloud the Miranda warning.

(2) KDFWR Policy 2.4 (Searches and Inspections)

**POLICY**

It is the policy of the Division that all searches and inspections are to be conducted within the provisions of the Fourth Amendment of the United States Constitution and KY Const. art. 13 § 11.

(3) KDFWR Policy 2.4 (Searches and Inspections)

**PROCEDURES**

A. **SEARCHES** – …If any sworn member has a question as to whether or not a search is lawful, the sworn member shall contact a supervisor. Any doubt should be resolved in favor of the individual's reasonable expectation of privacy.

## CONCLUSIONS OF LAW

1. The Hearing Officer concludes as a matter of law that the entry of Morton's residence was legal under the exigent circumstances doctrine of a protective sweep.

2. The Hearing Officer concludes as a matter of law the Appellee failed to prove by a preponderance of the evidence that the Appellant violated KDFWR Policy 2.26 (Operating His Body Camera), since no such policy was introduced into evidence.

3. Regarding the arrest of Morton and seizure of the marijuana which led to his indictment, the Hearing Officer takes cognizance of the Breckinridge Circuit Court's decision suppressing the evidence seized, which led to a voluntary dismissal of the charges by the prosecution.

As such, the Hearing Officer concludes as a matter of law the "law of the case" doctrine applies herein. The law of the case doctrine refers to the practice of courts in refusing to reopen what has been decided and of following a prior decision in an appeal of the same case. The doctrine applies not only to matters decided by necessary implication. See *Smith International Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1577 (Fed.Cir. 1985). Consistency derived from application of the law of the case doctrine avoids "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). The law of case doctrine has been applied to administrative agency proceedings, specifically by the "mandate rule." Briefly stated, that rule means that an inferior tribunal is bound to honor the decisions of superior tribunals within a single judicial system. See generally 1B MOORE'S FEDERAL PRACTICE (1993 Supp.) § 0.404(10); 18 C. Wright, A. Miller & E. Cooper FEDERAL PRACTICE AND PROCEDURE: Law of the Case § 4478 (1981). The law of the case doctrine "is concerned with the extent to which the law applied in decisions at various stages of the same litigation becomes the governing principle in later stages." See 1B MOORE'S FEDERAL PRACTICE (1993 Supp.) § 0.401. As one court has cogently put it: "[t]he 'mandate rule,' as it is known, is nothing more than a specific application of the 'law of the case' doctrine." *Piambino v. Bailey*, 757 F.2d 1112, 1120 (11th Cir. 1985); *Hoffman v. Sylva*, 476 U.S. 1169 (1986). The Board is bound by the mandates of Kentucky circuit courts because this is the judicial review authority for Board decisions. Decisions of the Franklin Circuit Court are controlling authority on the Board and all circuit courts are deemed to have statewide jurisdiction.

4. The Hearing Officer also concludes as a matter of law that the Personnel Board appeal filed by the Appellant herein is a part of the same litigation as the tangential criminal matter heard in the Breckinridge Circuit Court.

5. Given the above, the Hearing Officer therefore concludes as a matter of law the Agency has proved by a preponderance of the evidence the Appellant violated KDFWR Policy 2.4 by not seeking a search warrant and in his interactions with Charles Morton. Such violation also constitutes lack of good behavior and poor work performance under 101 KAR 1:345.

6. The Hearing Officer also concludes as a matter of law the 15-day suspension, demotion, and transfer to Henry County are neither excessive nor erroneous under the circumstances. Misty Judy's reasoning that the Appellant could no longer successfully work

with the Commonwealth Attorney's office and should no longer be in a supervisory capacity over his former colleagues is appropriate under the circumstances.

## RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeals of **RODNEY MILBURN V. TOURISM, ARTS AND HERITAGE CABINET, DEPARTMENT OF FISH AND WILDLIFE RESOURCES, (APPEAL NOs. 2018-042 and 2018-130)** be **DISMISSED.**

## NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

**Any document filed with the Personnel Board shall be served on the opposing party.**

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

**ISSUED** at the direction of **Hearing Officer R. Hanson Williams** this 9th day of January, 2019.

**KENTUCKY PERSONNEL BOARD**

**MARK A. SIPEK**
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Evan Jones
Hon. Ben Basil
Hon. David Leightty

**COMMONWEALTH OF KENTUCKY**
**PERSONNEL BOARD**
**APPEAL NO. 2018-041**

**THOMAS BLACKWELL** **APPELLANT**

**VS.** **FINAL ORDER SUSTAINING HEARING OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER AS ALTERED**

**TOURISM, ARTS AND HERITAGE CABINET, DEPARTMENT OF FISH AND WILDLIFE RESOURCES** **APPELLEE**

* * * * * * * * *

The Board, at its regular June 2019 meeting, having considered the record, including the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer dated January 31, 2019, Appellant's Exceptions and Request for Oral Argument, Appellee's Response to Exceptions, oral arguments, and being duly advised,

**IT IS HEREBY ORDERED** that the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer be altered as follows:

A. **Add** Background paragraphs 47, 48, 49, 50, 51, 52, 53, and 54.

47. The Hearing Officer sustained an objection to testimony to be offered by the Appellant that he was disciplined in retaliation for his activities associated with the Kentucky Conservation Officers Association. The Hearing Officer reasoned that the Appellant had specifically withdrawn his retaliation claim and, thus, the testimony would not be relevant. The Board agrees with Appellant's argument that the evidence should be considered in determining whether there was just cause for the disciplinary action. The testimony, which was offered by avowal, has been reviewed by the Board and considered as a part of this Order.

48. On avowal, Thomas Blackwell testified that, based on his position as Secretary of the Kentucky Conservation Officers Association (KCOA), he was contacted by Conservation Officer Josh Robinson who asked KCOA for assistance. KCOA made an Open Records request for documents from the investigation of Jimmy Bevins, who was a Commissioner. Records were shared with the Kentucky State Police and the Kentucky Attorney General's office.

49. Colonel Coffey was also a member of KCOA. He had a discussion with Blackwell regarding KCOA's review of this matter. They discussed the fact that Rodney Milburn, who was President of KCOA, would be sending out a memo to all members of KCOA. This document was sent out on November 16, 2017, and was admitted into evidence as Appellant's Exhibit 4.

50. Based on KCOA's review of this matter, Robinson was investigating an allegation that Jimmy Bevins was placing bait or corn on and around his property to prevent duck hunters. Officer Robinson investigated. Officer Robinson was initially confronted by Captain Richard Skaggs, who did not think it was a big deal and it did not need to be investigated. Later, Colonel Coffey instructed Robinson that because Jimmy Bevins was a Commissioner, this needed to be treated differently. The KCOA concluded that both Skaggs and Coffey engaged in unethical conduct. Their conduct was also investigated by the Executive Branch Ethics Commission.

51. Blackwell also testified that Captain Mehlbauer mentioned his discussions with Coffey. Blackwell testified that because of the timing of the complaints, he felt the investigation "reeked." He said they waited more than a year and, all of a sudden, there was an investigation regarding Blackwell and Milburn.

52. Officer Rodney Milburn testified that he talked to Officer Robinson about his investigation. He learned that Robinson was investigating the area on South Elkhorn Creek. He found there was corn in the snow and footprints which led back to Jimmy Bevin's house. Officer Robinson photographed the corn and the footprints. He later learned that Captain Skaggs did not want anything done. The United States Fish and Wildlife became involved. Both Skaggs and Coffey supported Bevins.

53. Milburn testified that on November 16, 2017, he sent a document to all KCOA members. He reached the conclusion that both Skaggs and Coffey committed ethical violations.

54. Milburn testified there was no question that there was a connection between his KCOA activities and his disciplinary action. He stated that, after two and a half years, the complaint was investigated and he was quickly placed on investigative leave.

B. **Delete** Findings of Fact paragraph 6, and substitute the following:

6. The Board finds that Mr. Morton was not given a timely *Miranda* warning by either Sergeant Milburn or the Appellant on the evening of November 7, 2015.

C. **Add** Findings of Fact paragraph 12, as follows:

12. The testimony offered by the Appellant and Rodney Milburn does not establish that the Agency took disciplinary action against the Appellant in retaliation for his KCOA activity. The Board finds no causal connection between Appellant's KCOA activity and his disciplinary action.

**IT IS FURTHER ORDERED** that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer, as altered, be and they hereby are approved, adopted and incorporated herein by reference as a part of this Order and that the Appellant's appeal is **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

**SO ORDERED** this 19th day of June, 2019.

KENTUCKY PERSONNEL BOARD

MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Evan Jones
Hon. Ben Basil
Hon. David Leightty
Ms. Misty Judy

**COMMONWEALTH OF KENTUCKY**
**PERSONNEL BOARD**
**APPEAL NO. 2018-041**

**THOMAS BLACKWELL** **APPELLANT**

**VS.** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER**

**TOURISM, ARTS AND HERITAGE CABINET**
**KENTUCKY DEPARTMENT OF FISH AND WILDLIFE RESOURCES** **APPELLEE**

** ** ** ** **

This matter came on for evidentiary hearing on August 16, 2018, and August 28, 2018, at 9:30 a.m., at 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky, before Geoffrey B. Greenawalt, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

The Appellant, Thomas Blackwell, was present at the evidentiary hearing and was represented by the Hon. Ben Basil and the Hon. David Leightty. The Appellee, Tourism, Arts and Heritage Cabinet, Department of Fish and Wildlife Resources, was present and was represented by the Hon. Amber Arnett.

By Interim Order dated May 2, 2018, at issue in the evidentiary hearing was the Agency's suspension of the Appellant and the Appellant's claims of political discrimination and retaliation. The Appellant's appeal was subsequently amended upon the Appellant's motion, whereupon the allegations of political discrimination and retaliation were removed as an issue before the Personnel Board. The Appellee was assigned the burden of proof on the issue of the suspension. The burden of proof was to be by a preponderance of the evidence.

## BACKGROUND

1. The Appellant, Thomas Blackwell, filed his appeal before the Kentucky Personnel Board on March 9, 2018, appealing from his five-day suspension from duty and pay, which suspension was effective beginning Monday, March 5, 2018, through the close of business on Friday, March 9, 2018. As mentioned above, upon motion of the Appellant, the allegations of political discrimination and retaliation were removed from his appeal.

2. The first to testify at the evidentiary hearing was **Major Shane Carrier.** Major Carrier has an extensive police administration background and has been with the Kentucky Department for Fish and Wildlife Resources (KDFWR) for approximately nineteen years. He has held his current position as Conservation Officer Major for the last five years. Major Carrier testified that the Appellant was a Conservation Officer I (CO I) at the time of the subject search and, as far as he was aware, still held that position.

3. Major Carrier testified that the basic principles of search and seizures are taught to sworn officer recruits early on during their training process.

4. Appellee's Exhibit 1 was introduced into the record and is a copy of KDFWR Policy No. 2.20, Administrative Investigations. This policy has to do with investigating complaints filed against an officer of the Law Enforcement Division.

5. Appellee's Exhibit 2 was introduced into the record and is a synopsis of the investigation prepared by Captain Phillips regarding the Appellant's involvement in an alleged illegal search and seizure which occurred on November 7, 2015, at the residence of Charles Morton, Jr. In Breckinridge County. This incident resulted in the criminal prosecution of Mr. Morton, which was eventually dismissed on the basis that the evidence gathered against Mr. Morton was obtained illegally by the Appellant and Sergeant Rodney Milburn. Captain Phillips was of the opinion that the complaint filed against the Appellant for his involvement in the subject illegal search and seizure was valid, accurate and correct.

6. Appellee's Exhibit 3 was introduced into the record and is a thumb-drive containing the video footage recorded from the Appellant's body camera on the evening of November 7, 2015, as well as the suppression hearing held by the Breckinridge Circuit Court during the Morton criminal prosecution. Appellee's Exhibit 3 is found to be highly probative and leaves little doubt as to the actions of the Appellant taken on the evening of November 7, 2015.

7. Appellee's Exhibit 4 was marked for identification by Major Carrier and was ultimately introduced through the testimony of Jeremy Logsdon, the Assistant Commonwealth Attorney for Breckinridge County. Contained within Appellee's Exhibit 4 is an Order sustaining the Defendant's (Mr. Morton) motion to suppress the evidence procured by the Appellant during the search which occurred on November 7, 2015. The criminal action against Mr. Morton was ultimately dismissed because all the evidence in the matter was suppressed based upon Appellant's illegal search and seizure.

8. Appellee's Exhibit 5 was introduced into the record and is a copy of KDFWR Policy 2.2, Arrest and Citations. Specifically, attention was directed to paragraph 6(b) indicating that, "Before a suspect is interviewed in a custodial interrogation, the sworn member shall read aloud the Miranda warning."

9. Appellee's Exhibit 6 was introduced into the record and is a copy of KDFWR Policy 2.4, Searches and Inspections. Attention was directed to Procedures, A. Searches, found on page one of the Policy, which states in pertinent part: "If any sworn member has a question as to whether or not a search is lawful, the sworn member shall contact a supervisor. Any doubt should be resolved in favor of the individual's reasonable expectation of privacy." According to Major Carrier, there is no question that Mr. Morton was in custody when he was interrogated by the Appellant. According to Major Carrier, in addition to Capt. Phillips' investigation substantiating the complaint against the Appellant, the suppression hearing shown on Appellee's Exhibit 3, spoke for itself.

10. Based upon his review of Captain Phillips' investigation and the suppression hearing, Major Carrier found that the complaint against the Appellant regarding the illegal search and seizure of Mr. Morton's home was substantiated. Major Carrier noted that after reviewing the video footage from the Appellant's body camera, he agreed that the initial entry into the residence of Mr. Morton for officer safety concerns was justified. However, the subsequent search and interrogation of the residence was done contrary to law. He also noted there did not appear to be any exigent circumstances and that proper protocol would have been to secure the premises, detain Mr. Morton, and pursue a search warrant. (See Appellee's Exhibit 7, which was introduced into the record by Major Carrier.)

11. Major Carrier's recommendation, introduced and marked as Appellee's Exhibit 7, was that the Appellant be reprimanded and given follow-up remedial training.

12. Upon cross-examination, Major Carrier admitted that on November 7, 2015, during the alleged illegal search and seizure, the Appellant was a CO I and was accompanied by his senior officer, Sgt. Milburn.

13. Major Carrier admitted he was not an appointing authority for the Appellee. He further stated he did not recommend that the Appellant be suspended because he was under the impression disciplinary action was to be progressive. In addition, he was aware of other officers who had violated policy who had not been suspended for five days. Finally, Major Carrier admitted he had never previously been tasked with disciplining an employee.

14. The next to testify was **Michael Schwendeman**. Mr. Schwendeman, Staff Attorney III, is a legal instructor. His basic duties are to prepare training materials, plans, etc., for sworn officers for both basic and advanced training.

15. Appellee's Exhibit 8 was introduced into the record and is a copy of the Appellant's training history. According to Mr. Schwendeman, the Appellant was well trained on the subject of searches, mirandizing, and exigent circumstances. He noted that the Appellant received twelve hours of search and seizure training and two hours of interrogation training. He noted that under the Fourth Amendment of the U.S. Constitution, a person's home is at the top of the list for a reasonable expectation of privacy, so a warrant is needed to search the same unless there is voluntary consent or exigent circumstances, which allows for limited action in emergency situations. Specifically, a sworn officer can only do what is necessary to take care of the danger at hand. Examples of which are a life being in danger, evidence being in eminent danger of loss or destruction, damaged property, or during a hot pursuit situation.

16. Mr. Schwendeman testified that a sworn officer must read a suspect's Miranda rights during any custodial interrogation. Being in custody is not limited to actually being under arrest, but is also found when a reasonable person believes his movement is substantially limited. According to Mr. Schwendeman, if a person is handcuffed he is in custody for Miranda purposes.

17. On cross-examination, Mr. Schwendeman testified that, depending on the circumstances, a threat to a sworn officer's safety can be considered an exigent circumstance. However, he noted that a sworn officer is limited to dealing with the emergency only. Mr. Schwendeman acknowledged he had not seen the Appellant's bodycam video produced during the subject November 7, 2015 search.

18. The next to testify was **Ms. Misty Judy**. Ms. Judy held the position of Executive Director of Human Resources with the Appellee, and at the time of the hearing was also the Acting Deputy Commissioner of KDFWR. Ms. Judy is also a designated appointing authority for all the Tourism agencies, including the KDFWR, and has a variety of disciplinary action experience.

19. Appellee's Exhibit 9 was introduced into the record and is a copy of the letter placing the Appellant on administrative leave. The letter was also signed-off on by Billye Haslett, who at the time was the Division Director of Administrative Services for KDFWR. According to Ms. Judy, she has placed employees on administrative leave numerous times at numerous agencies.

20. Appellee's Exhibit 10 was introduced into the record and is a copy of the Appellant's suspension letter dated March 2, 2018. Said letter was signed-off on by Ms. Judy, in her capacity as Executive Director and Designated Appointing Authority for the Tourism, Arts and Heritage Cabinet. Ms. Judy also drafted the letter and made the ultimate decision to suspend the Appellant.

21. According to Ms. Judy, her decision to suspend the Appellant for five days was based upon a review of all the relevant evidence and information, which included the Appellant's personnel file, training records, evaluations, Captain Phillips' investigation, the court proceedings in the Breckinridge Circuit Court, as well as prior case decisions at the Personnel Board. Based upon the same, Ms. Judy found the Appellant's search and seizure to be an egregious infraction because it demonstrated a fundamental misunderstanding of Constitutional law, exposed the Appellee, as well as the Appellant, to liability, and affected the Appellee's credibility. In addition, the illegal search and seizure was very fundamental to the Appellant's job duties and was a very significant and textbook case of a violation of constitutional law with regard to search and seizures. In Ms. Judy's opinion, when there is a violation of a citizen's Constitutional rights, the discipline required goes well above reprimanding or counseling. In addition, with supervisors, managers, and officers, she will usually hold them to a higher level of care, because they are better trained and have more authority that can be abused. Ms. Judy was simply not confident the Appellant could remain in the field until this issue was squarely addressed. Appellee's Exhibit 11 was also introduced into the record and is a copy of the Conservation Officer I Job Class Specification.

22. Ms. Judy testified that she could have suspended the Appellant for up to thirty days. However, she was convinced there were enough mitigating factors that she went with a shorter suspension. These factors included the fact the Appellant was a CO I with only eighteen months of experience, that a senior officer (Sergeant Milburn) was on the scene during the illegal search and seizure, and that he had all good evaluations

23. In this particular instance, Ms. Judy noted that the senior officer did not attempt to follow policy and did not contact a supervisor with any questions. In addition, the Appellant very clearly entered Mr. Morton's home after he had been handcuffed and conducted a secondary search of the locked gun cabinet.

24. On cross-examination, Ms. Judy testified that the Appellant's actions were unlawful as soon as he and his superior officer took Mr. Morton inside his home while handcuffed. According to Ms. Judy, Mr. Morton should have been mirandized once he was cuffed or told he was under arrest. Ms. Judy acknowledged the Appellant's superior officer, Sergeant Milburn, was responsible for most of the improper search and interrogation, but noted the Appellant was present and did nothing to stop it.

25. Ms. Judy testified that Captain Phillips' investigation of the Appellant's involvement in the alleged incident did not start until November 2017 because it had not come to her attention until the Fall of 2017. Otherwise, Ms. Judy did not know why there was a delay between the suppression hearing and the filing of the complaint against the Appellant.

26. The next to testify on behalf of the Appellee was **Jeremy Logsdon**. Mr. Logsdon's testimony was taken out of order by agreement on day two of the hearing. Mr. Logsdon is the first Assistant Commonwealth Attorney in the 46th Judicial District, which includes Grayson, Breckinridge, and Meade counties. He has acted in such capacity for approximately seven and a half years. According to Mr. Logsdon, he knew the Appellant as an officer and had worked with him briefly prior to the criminal action taken against Charles Morton. Mr. Logsdon reviewed all the documents contained in Appellee's Exhibit 4 and testified that he recognized the same. He stated he had been assigned to prosecute the Morton case from his arraignment forward.

27. While preparing the case against Mr. Morton, Mr. Logsdon read through the officer's report and realized there was body camera footage from the alleged incident he had not yet seen. He noted that the officer's report did not indicate Mr. Morton had been mirandized prior to his confession to trafficking in marijuana and wanted to be certain that had occurred. Mr. Logsdon knew there might be an evidence suppression problem. Prior to the suppression hearing, Mr. Logsdon informed the Appellant that there was a potential problem regarding whether Mr. Morton had been mirandized. The Appellant then exited the building to speak with Sergeant Milburn. After speaking to Sergeant Milburn, the Appellant informed Mr. Logsdon that Morton had in fact been mirandized. However, following a review of the body camera footage, it was clear Mr. Morton had never been mirandized and the evidence against him was tainted. Mr. Logsdon wanted to get both the Appellant and Sergeant Milburn on the stand at the suppression hearing before showing them the tape. According to Mr. Logsdon, it was pretty clear to him that Milburn had lied and that Mr. Morton had never been mirandized before his home was entered and searched. Shortly after the court ruled in Mr. Morton's favor and suppressed the evidence procured against him by the Appellant and Milburn, Mr. Logsdon moved the court to dismiss the action against Mr. Morton in light of having watched a sworn

officer perjure himself.

28. When asked why he never said anything to anybody about his suspected perjury, Mr. Logsdon stated that he considered bringing a perjury charge, but eventually decided not to pursue it. He did not think about the case again until several months had passed and Capt. Phillips had contacted him.

29. Mr. Logsdon's testimony marked the end of the Appellee's case in chief.

30. The next to testify was the Appellant, **Thomas Blackwell**. At the time of the hearing, Mr. Blackwell was still employed by KDFWR and had been promoted to CO II.

31. Mr. Blackwell testified that on November 7, 2015, he went to Mr. Morton's home to serve a misdemeanor summons for deer poaching. His superior officer, Sergeant Rodney Milburn, was in the area so he went along with him. In addition to serving the summons, Mr. Blackwell wanted to inspect and confiscate the weapon involved in the alleged illegal killing of a deer. Mr. Blackwell stated that when he arrived at Mr. Morton's trailer to serve the summons, it was dark and there was only one bare light illuminating the front porch. Further, there were not trees or shrubs for cover to fall back on in the event of an attack. When Mr. Morton first came to his door, both the Appellant and Milburn could not see his right side. They were not sure if he had a weapon in his hand or if anyone else was in Mr. Morton's residence. Mr. Morton came out of his residence and was standing on the front porch when the officers asked to see his hunting license and the offending weapon. When Mr. Morton turned to go inside his trailer, Milburn followed right behind him. In an effort to prevent Milburn from entering his home, Mr. Morton raised his hand and was thereafter subdued and handcuffed. Milburn then entered the trailer and noticed a handgun. He also smelled marijuana smoke and saw a small amount of marijuana in plain sight. Although the Appellant and Milburn were aware Mr. Morton had at least one weapon and was most likely under the influence of marijuana, they did not know whether there was anyone else in Mr. Morton's trailer. So a sweep of the premises was performed, which confirmed no one else was present. They also secured Mr. Morton's handgun in a lock box. The Officers continued to interrogate Mr. Morton and searched a gun locker at which time they found a large quantity of marijuana. Mr. Morton was then officially arrested. Mr. Blackwell testified that, according to Milburn, Mr. Morton had been mirandized while still at the trailer. Mr. Blackwell then explained that arrests are reported up the chain and that his superiors would have been aware of this particular arrest back in 2015. For reasons unknown, the Appellant never heard a word from any supervisor about this particular arrest until late 2017. Appellant's Exhibit 1 was introduced into the record and is the Criminal Complaint Summons Mr. Blackburn was tasked with serving upon Mr.

Morton in November 2015.

32. Appellant's Exhibit 2 was introduced into the record and is a copy of the Appellant's 2016 job performance evaluation review in which he received an "Outstanding" review. Appellant's Exhibit 3 was introduced into the record and is a copy of the Appellant's 2017 Performance Evaluation in which he received a "Highly Effective" review. Neither review made any mention about the Morton case.

33. The Appellant testified that, following the arrest of Mr. Morton, he was contacted by Assistant Commonwealth Attorney Logsdon who wanted a copy of his bodycam video. He also received a subpoena to appear at Mr. Morton's suppression hearing. It was not until after the suppression hearing that the Appellant first heard there was anything wrong with the Morton arrest.

34. The Appellant attempted to introduce evidence regarding the Appellee's motive for investigating him. The Appellee objected and its motion was sustained on the basis that the Appellee's motivation for investigating the Appellant was irrelevant and that the only issue before the Personnel Board was whether there was just cause for the Appellant's suspension and whether said penalization was either excessive or erroneous.

35. According to the Appellant, he appealed his suspension to the Personnel Board because of its timing.

36. On cross-examination, the Appellant admitted the summons he was to serve upon Mr. Morton was for a misdemeanor violation and that he had no arrest authority based upon the same. Mr. Blackwell also testified he had worked with Milburn for more than a year and that Milburn would have allowed him to mirandize someone freely if he had so chosen. Milburn would have also allowed the Appellant to obtain a search warrant if he had wanted. Finally, the Appellant admitted he performed a CourtNet history search on Mr. Morton prior to serving the subject summons and found no major red flag which would have caused him to insist upon having back up when he served the same.

37. The next to testify at the hearing was **Rodney Milburn**. Mr. Milburn has been with KDFWR for nine plus years and is currently a CO I, working out of Washington County. In 2015, during the alleged search and seizure incident, he was a Sergeant in the Third District, which included Breckinridge County. Prior to coming to KDFWR, Mr. Milburn had retired as a Major with the Louisville Metro Police Department where he enjoyed a twenty-nine-year career.

38. Mr. Milburn testified he was involved in the Morton arrest and that on November 7, 2015, at approximately 7:30 p.m. (EST), he and the Appellant arrived at the trailer of Mr. Morton. At the time, it was dark and the trailer was poorly lit. Once Mr. Morton came to the door, he could not see him very well, could not see his right hand, but could smell marijuana smoke. Mr. Milburn considered himself and the Appellant to be in a fatal funnel as they were lit while Mr. Morton was not. According to Mr. Milburn, it was a bad deal and common sense dictated that one would not allow an impaired person that they know nothing about to go back inside his home in order to procure his gun and hunter's license. As such, Mr. Milburn decided to follow him into the trailer. This occurred after Mr. Morton had been handcuffed, but before he had been arrested.

39. According to Mr. Milburn, there were exigent circumstances because the use of narcotics was involved and, as a safety matter, he and the Appellant were not sure if there was anyone else in the trailer or if there was a weapon inside the trailer that could have been used against them.

40. Mr. Milburn testified that he did give Mr. Morton a Miranda warning, but could not remember when. However, he thought it might have been about the time they were leaving the trailer.

41. According to Mr. Milburn, the arrest citation was sent to his supervisor, Capt. Mehlbauer.

42. Mr. Milburn's next involvement with the Morton case came at the Grand Jury and subsequent suppression hearing. After the suppression hearing, he discussed the outcome with Capt. Mehlbauer who would have also known very well about the outcome of the suppression hearing through his wife, who worked as a Deputy Circuit Clerk in Breckinridge County. In short, the chain of command at KDFWR were well aware of the incident as far back as late 2015.

43. On cross-examination, Mr. Milburn testified that for his part in the Morton incident, he had been disciplined by the Appellee and was placed on sixty days paid investigative leave, received a fifteen-day suspension, a ten percent reduction in salary, a demotion, and a transfer.

44. Mr. Milburn's testimony ended Appellant's case in chief.

45. **Misty Judy** was brought back as a rebuttal witness for the Appellee. She testified that there was no comment about the Appellant's paid leave on his 2017 evaluation, because at the time, the investigation had not been completed.

46. The Hearing Officer has considered the entire administrative record, including the testimony and exhibits therein.

## FINDINGS OF FACT

The Hearing Officer makes the following Findings of Fact by a preponderance of the evidence.

1. The Appellant, Thomas Blackwell, a classified employee with status, timely filed his appeal with the Personnel Board on March 9, 2018, appealing from his five-day suspension from duty and pay and on the basis of retaliation and political discrimination. Upon the Appellant's own motion submitted to the Personnel Board on June 29, 2018, his appeal was amended to remove the allegations of retaliation and political discrimination.

2. Pursuant to the Interim Order dated May 2, 2018, the issues before the Personnel Board were the Appellant's five-day suspension from duty and pay and his allegations of retaliation and political discrimination. As mentioned above, the Appellant's appeal, and, thus, the issues before the Personnel Board were amended to remove the allegations of retaliation and political discrimination.

3. On November 7, 2015, the Appellant, along with his senior officer, Rodney Milburn, descended upon a residence of Mr. Charles E. Morton to serve a Criminal Complaint Summons for the misdemeanor offence of illegally taking a deer, among other violations. See Appellant's Exhibit 1.

4. In November 2015, Rodney Milburn was a Sergeant with KDFWR and had an extensive police background. The Appellant had been a CO I for approximately eighteen months.

5. What happened at Mr. Morton's trailer on November 7, 2015, is clearly demonstrated on the Appellant's bodycam video, which may be found as part of Appellee's Exhibit 3. A more detailed written description of what occurred on November 7, 2015, is found within the Appellant's suspension letter marked as Appellee's Exhibit 10. The facts and occurrences set forth in said Appellee's Exhibit 10 are found to be accurate, credible, and

reliable. The Appellant's bodycam footage speaks for itself and confirms these details.

6. There is no credible evidence of record that either Sergeant Milburn or the Appellant mirandized Mr. Morton on the evening of November 7, 2015.

7. Based upon the overwhelming evidence of record, it is found that the Appellant's actions constituted a lack of good behavior and unsatisfactory performance of duties as alleged in his suspension letter dated March 2, 2018, and marked as Appellee's Exhibit 10.

8. Misty Judy is the Appointing Authority for the Appellee. Over the course of her lengthy career with several state agencies, Ms. Judy has garnered ample experience dealing with a variety of employee disciplinary issues, including suspension from duty and pay.

9. In addition to reviewing numerous available resources, including the Appellant's personnel file, training records, disciplinary history, job performance evaluations, Captain Phillip's investigative report, the video tape of the court proceedings in Breckinridge County, and prior case law at the Personnel Board, Ms. Judy properly considered several mitigating factors as well. These mitigating factors included the Appellant's limited experience on the job as well as the fact the incidents all occurred within the presence of a senior officer. In addition, his performance evaluations were all very good.

10. Ms. Judy testified that although she could have given the Appellant a written reprimand for his actions, she chose to increase the level of disciplinary action because his offense demonstrated a fundamental misunderstanding of his authority as a sworn officer, which could not be overlooked and need to be addressed. In addition, such a fundamental misunderstanding could expose the Appellee and/or the Appellant himself to civil liability.

11. Ms. Judy noted that Sgt. Milburn was responsible for most of the improper actions, but the Appellant did nothing to stop him.

## CONCLUSIONS OF LAW

1. This matter is governed by KRS 18A.095(1), which states:

> A classified employee with status shall not be dismissed, demoted, suspended, or otherwise penalized except for cause.

2. The Appellee has demonstrated by a preponderance of the evidence that the Appellant's five–day suspension from duty and pay as a Conservation Officer I, for lack of good behavior and unsatisfactory performance of duties, all as set forth more specifically on Appellee's Exhibit 10, was neither excessive nor erroneous under the circumstances and was taken for just cause.

## RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **THOMAS BLACKWELL V. TOURISM, ARTS AND HERITAGE CABINET, KENTUCKY DEPARTMENT OF FISH AND WILDLIFE RESOURCES (APPEAL NO. 2018-041)** be **DISMISSED.**

## NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

**Any document filed with the Personnel Board shall be served on the opposing party.**

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

**ISSUED** at the direction of **Hearing Officer Geoffrey B. Greenawalt** this 31st day of January, 2019.

**KENTUCKY PERSONNEL BOARD**

**MARK A. SIPEK**
**EXECUTIVE DIRECTOR**

A copy hereof this day mailed to:

Hon. Ben Basil
Hon. David Leightty
Hon. Evan Jones